NO. 88-965

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

LEIGHTON EWELL, ROSA McMILLAN, BETTY CRAIG AND DOLESE CONCRETE COMPANY,

Petitioners,

V.

HONORABLE HERBERT W. THOMPSON, COMMISSIONER OF CONSERVATION AND ASSISTANT SECRETARY, OFFICE OF CONSERVATION OF THE STATE OF LOUISIANA, ET AL.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Robert L. Redfearn*
James A. Burton
John C. Herbert
Judy Perry Martinez
SIMON, PERAGINE, SMITH & REDFEARN
30th Floor, Energy Centre
1100 Poydras Street
New Orleans, LA 70163
Telephone: (504) 569-2030
Attorneys for Leighton Ewell, Rosa McMillan, Betty Craig and Dolese Concrete Company, Petitioners

*Counsel of record

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED FOR REVIEW

This petition for certiorari presents for determination by this Court the question whether the longstanding practice of the Commissioner of Conservation for the State of Louisiana of notice of hearings by publication is sufficient to satisfy the due process requirements of the Constitution of the United States. Specifically, petitioners[1] were deprived of property rights by an order of the Commissioner of Conservation which resulted from a hearing of which petitioners did not receive notice. The resolution of this issue is of great importance not only to petitioners but to many others holding oil, gas and mineral interests in Louisiana who may continue to be affected by the longstanding practices of the Commissioner of Conservation.

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[1] The parties to this proceeding include the petitioners: (1) Leighton Ewell; (2) Rosa McMillan; (3) Betty Craig; and (4) Dolese Concrete Company, which is a wholly owned subsidiary of The Dolese Company. Respondents are the defendant below, The Honorable Herbert W. Thompson, Commissioner of Conservation and Assistant Secretary, Office of Conservation for the State of Louisiana; and the intervenors below, who intervened on the side of the defendant: (1) Celeron Oil & Gas Company; (2) First Energy Corporation; (3) Union Texas Petroleum; (4) Terra Resources, Inc.; (5) Borden, Inc.; and (6) TXO Production Corporation. Other parties in the proceeding below include the above parties as well as the remaining plaintiffs below who have not presented this petition for writ of certiorari: (1) Kaiser Aluminum Exploration Company; (2) Park Lane Enterprises, Inc.; (3) Expec Resources, Limited; (4) Louisiana National Bank as Trustee for Kirk E. Williams, Jr. Inter Vivos Trust and Bernadette S. Williams Inter Vivos Trust; (5) David Ewell; and (6) Chevron U.S.A. Inc. Acme Brick Company, Tolmak, Inc. and Kansas City Southern Railway Company also were plaintiffs below, but did not appeal the trial court judgment. Rolfe McCollister, Sr., T. N. Samuel, Goldie Kizer, Roland C. Kizer, Marion Kizer Jackson and Roland C. Kizer, Jr. also intervened in the district court but did not appeal the judgment of the Court of Appeal.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LEIGHTON EWELL, ROSA McMILLAN, BETTY CRAIG AND DOLESE CONCRETE COMPANY,

Petitioners,

v.

HONORABLE HERBERT W. THOMPSON, COMMISSIONER OF CONSERVATION AND ASSISTANT SECRETARY, OFFICE OF CONSERVATION OF THE STATE OF LOUISIANA, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

REPORTS OF THE OPINIONS OF THE COURTS BELOW

The opinion of the Supreme Court of Louisiana was reported at 525 So.2d 1050 (La. 1988). Appendix F. The denial of the rehearing by the Supreme Court of Louisiana was reported at 530 So.2d 552 (La. 1988). Appendix G. The opinion of the Court of Appeal, First Circuit, Louisiana was reported at 523 So.2d 240 (La. App. 1st Cir. 1988), Appendix D, which reported opinion incorporates amendment of

the decretal paragraph upon rehearing dated March 30, 1988, Appendix E. The opinion of the Court of Appeal, First Circuit, Louisiana, denying repondent's motion for dismissal of the appeal on the basis of mootness was reported at 512 So.2d 1197 (La. App. 1st Cir. 1987). Appendix C. Order Number 1047-B of the Commissioner of Conservation for the State of Louisiana dated September 11, 1985, bears an effective date of July 23, 1985. Appendix A.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on May 20, 1988. Appendix F. A timely petition for rehearing was denied on September 9, 1988. Appendix G. This petition for certiorari was timely filed. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case involves a determination as to the constitutionality of the longstanding practices of the Commissioner of Conservation for the State of Louisiana under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, which provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

> law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, Section 1. This case also turns on the Louisiana Conservation Act, La. R.S. 30:1 *et seq.*, and the Rules of Procedure of the Commissioner of Conservation for the State of Louisiana promulgated pursuant thereto. The pertinent statute and rules are attached hereto as Appendix H.

STATEMENT OF THE CASE

Petitioners own real property located in East Baton Rouge Parish, Louisiana. As a result of an administrative order of the Commissioner of Conservation for the State of Louisiana ("Commissioner") effective November 21, 1978, petitioners' property was included in oil and gas drilling and production units created for the development of the Irene Field, Baton Rouge, Louisiana. The units covering petitioners' property have never produced oil or gas. Other units in the Irene Field have been productive.

On May 17, 1985, respondent Celeron Oil & Gas Company ("Celeron") initiated an administrative proceeding before the Commissioner that ultimately led to the dissolution of the drilling and production units covering petitioners' property and the simultaneous creation of new units that did not include petitioners' property.

In simplest terms, Celeron sought an order dissolving the old units and creating new units on the ground that the oil and gas production history of Irene Field had revealed the true geologic limitations of the subsurface natural gas reservoir. Thus, Celeron urged that new production units were necessary to reflect the true nature of the field's reservoir. Parties affected by the proposed revision were invited to express opposition to Celeron's application at a prehearing conference. It is uncontroverted that one of the

petitioners, Dolese Concrete Company, did not receive actual or written notice of the prehearing conference. As to the remaining three petitioners, although each testified in the district court that he or she did not receive any notice in any form, respondents contended that these three petitioners received actual notice.

At the prehearing conference, Celeron's proposal drew opposition and the matter was set for public hearing. Significantly, one of the parties opposing Celeron's application recommended a different proposal that included the property of petitioner, Dolese Concrete Company, within the boundaries of the proposed units.

Under the law of Louisiana, La. R.S. 30:6, and rules of procedure promulgated by the Commissioner ("Commissioner's rules of procedure"), an applicant seeking the issuance of an order is required to give notice of the prehearing conference and of the public hearing to parties who may be affected by the proposed order in the manner prescribed by the Commissioner's rules of procedure. Appendix H. Thus, Celeron, the applicant, was the party charged with the responsibility of giving notice of the prehearing conference and the public hearing convened to consider evidence relating to Celeron's application.

It also is uncontroverted that petitioners did not receive written notice of the public hearing. Although it was established without doubt that petitioner, Dolese Concrete Company, did not receive actual notice, Celeron alleged that the three remaining petitioners received actual notice of the public hearing by word of mouth.

Notice of the hearing was published in the official state journal and was posted in public places in the surrounding area. The public hearing was conducted by the Commissioner on July 23 through 25, 1985, notwith-

standing the fact that he was informed at least one week prior to the hearing that petitioners, along with other persons, had not received written notice of the hearing. Subsequent to the hearing, the dissolution of the old units and creation of new units was effected by an order dated September 11, 1985 and effective July 23, 1985, issued by the Commissioner. ("Order Number 1047-B").

Suit was brought against the Commissioner in the Nineteenth Judicial District Court, Parish of East Baton Rouge, Louisiana, seeking judicial review of Order Number 1047-B and a declaration that the order was invalid. Petitioners, along with other plaintiffs, contended, *inter alia*, that the issuance of Order No. 1047-B in the absence of notice to petitioners violated: 1) Section 30:6B of Louisiana's Conservation Act (La. R.S. 30:1 *et seq.*); and 2) the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article 1, Section 2, the Due Process Clause of the Louisiana Constitution. Celeron and other parties intervened in the suit and aligned themselves with the Commissioner. [2]

At the trial in the district court, each of the petitioners testified that he or she did not receive written notice of the hearing, did not receive notice by any other means and did not participate in the hearing affecting his or her property. Appendix D, at A-31, A-33.

During the trial, petitioners also presented the deposition testimony of Mr. George Harris, the Celeron representative charged with the responsibility of compiling

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[2] The intervenors were Celeron Oil & Gas Company, First Energy Corporation, Union Texas Petroleum, Terra Resources, Inc., Borden, Inc., TXO Production Corporation, Rolfe McCollister, Sr., T. N. Samuel, Goldie Kizer, Roland C. Kizer, Marion Kizer Jackson, and Roland C. Kizer, Jr.

the list of persons who would receive written notice of the hearing. Under Celeron's proposal, twenty units were to be dissolved, each of which was designated by a letter (A - T). Appendix D, at A-38. Mr. Harris testified that he made no effort whatsoever to discover the names and addresses of persons owning property in eight of the units (M - T) that Celeron sought to dissolve, which included the units covering petitioners' property. Appendix D, at A-36 - A-38.

Mr. Harris also testified that he did not even know at the time he compiled the list of persons who would receive notice that his employer, Celeron, had requested that these eight units — covering a surface area of eight square miles -- be dissolved. Appendix D, at A-36 - A-38. The units covering petitioners' property were among these units and petitioners' ownership of the property was reflected on a survey plat that Celeron had in its possession at the time it undertook to identify those parties who would be notified.

Finally, Mr. Harris testified that he was not trying to ascertain any owners of property in the units designated P - T because he did not think that those owners were interested in the hearing. Appendix D, at A-37.

The district court rendered judgment in favor of Celeron and the other defendant-intervenors. Appendix B. Two aspects of the court's oral reasons in support of judgment are noteworthy. First, the court concluded that although petitioners had not received written notice, three of the four petitioners received actual notice. The court did not address the fourth petitioner, Dolese Concrete Company, but the clear implication is that the court concluded that Dolese Concrete Company did not receive actual notice. Second, the court found that the record reflected that a reasonable effort had been made to give notice to

petitioners. Appendix B.

Petitioners took an appeal to the Court of Appeal, First Circuit, State of Louisiana, specifying and briefing seven points of error. Included among the seven points of error were 1) the district court erred in finding that adequate notice of the hearing had been given; 2) the district court erred in failing to find that issuance of Order Number 1047-B in the absence of notice violated Louisiana's Conservation Act; and 3) the district court erred in failing to find that the issuance of Order Number 1047-B in the absence of notice to petitioners violated their rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The Court of Appeal reversed the district court and held that all four petitioners had not received written or actual notice of the public hearing; that Louisiana's Conservation Act, La. R.S. 30:6B required Celeron to give written notice to petitioners; and that issuance of Order Number 1047-B in the absence of such notice violated La. R.S. 30:6. Appendix D, at A-26. With respect to the reasonableness of Celeron's effort to notify petitioners, the Court of Appeal found:

> . . . Celeron, the applicant did not conduct a reasonable search or make a reasonable effort as to those parties in Units M-T. Examination of the record shows that Celeron put forth no effort to ascertain the parties involved in Units M-T.

Appendix D, at A-40 - A-41. In holding that "*no* effort was made to notify those in the remaining eight units" and thus Order Number 1047-B was issued in violation of La. R. S.

30:6B, the Court of Appeal did not find it necessary to reach the question of whether issuance of the order violated petitioners' rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Appendix D, at A-26.

Respondents filed an application for writ of certiorari to review the decision of the Court of Appeal for the First Circuit in the Supreme Court of Louisiana.[3] Respondents' application for writ of certiorari set forth eight assignments of error. Seven of respondents' assignments of error are pertinent here, and they can be grouped into five general categories:

1. Petitioners' appeal to the Court of Appeal was moot;
2. Petitioners failed to demonstrate that the failure to receive notice prejudiced substantial rights;
3. Louisiana's Conservation Act did not require Celeron to furnish petitioners with advance written notice of public hearing;
4. Celeron fully complied with the notice requirements even though petitioners did not receive written notice; and
5. The Commissioner's rules of procedure specifically prohibit the invalidation of an order for failure to give notice of a public hearing.

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[3] Respondents filed an application for rehearing which was granted for the limited purpose of clarifying the invalidity of Order Number 1047-B. The amended decretal paragraph is incorporated in the reported opinion of the Court of Appeal. Appendix D, at A-45.

Respondents' application for writ of certiorari did not address the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

On May 20, 1988, the Supreme Court of Louisiana granted respondents' application and summarily reversed the judgment of the Court of Appeal and reinstated the judgment of the district court. The Supreme Court offered no explanation for its summary reversal.

Petitioners timely filed an application for rehearing and subsequently filed a supplemental memorandum in support of application for rehearing. Petitioners' application for rehearing was based in part on the Louisiana Supreme Court's lack of written reasons for its reversal of the judgment of the Court of Appeal and its presumed failure to consider petitioners' argument that the issuance of Order Number 1047-B in the absence of notice to petitioners violated their rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petitioners' supplemental memorandum was largely devoted to this Court's recent decision in *Tulsa Professional Collection Services, Inc. v. Pope,* ____ U.S. ____, 108 S.Ct. 1340 (1988), and reurged the Supreme Court of Louisiana to consider petitioners' federal due process argument. The application for rehearing was denied on September 9, 1988.

As a result of the Supreme Court of Louisiana's refusal to explain the basis of its reversal of the judgment of the Court of Appeal, petitioners on December 5, 1988, filed their motion for certificate as to existence of a federal question. The certificate filed with petitioners' motion, if executed by the Supreme Court of Louisiana, will establish whether or not 1) the Supreme Court concluded that petitioners' appeal to the First Circuit Court of Appeal was

moot; and 2) in the course of denying petitioners' application for rehearing, the Supreme Court considered and rejected the contention that issuance of Order Number 1047-B violated petitioners' rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

ARGUMENT

I.

The Supreme Court of Louisiana's decision that Order Number 1047-B could be issued in the absence of written notice of the public hearing conflicts with decisions of this Court.

It is undisputed that petitioners did not receive written notice of the public hearing resulting in the issuance of Order Number 1047-B. Respondents in their application for writ of certiorari filed in the Supreme Court of Louisiana sought to justify this result by contending:

1. the law of Louisiana did not require Celeron to provide written notice of the public hearing;

2. even if the law of Louisiana and the Commissioner's rules of procedure required Celeron to provide written notice, the Commissioner is empowered under his rules to issue orders notwithstanding a failure to provide written notice; or

3. Celeron made a reasonable attempt to discover the identity of petitioners and thus the failure to provide written notice is excused.

The Supreme Court of Louisiana, in reversing the Court of Appeal and reinstating the district court judgment, necessarily accepted one or more of the foregoing justifications.[4] Each of the three justifications for issuing Order Number 1047-B runs afoul of decisions of this Court.

The Supreme Court of Louisiana's conclusion that written notice of the public hearing was not required conflicts with this Court's rulings in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Mennonite Board of Missions v. Adams,* 462 U.S. 791 (1983); and *Tulsa Professional Collection Services, Inc. v. Pope,* ____ U.S. ____, 108 S.Ct. 1340 (1988). The Court in *Mullane* made clear that notice of state action affecting property was essential: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314.

In *Mennonite,* the Court further refined the notice requirement in the context of state action affecting property interests: ". . . actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." 462 U.S. at 800. (Emphasis in original).

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[4] The Supreme Court's summary reversal of the Court of Appeal necessarily requires petitioners to speculate as to the basis of that Court's decision. The certificate as to the existence of federal question will eliminate the possibility that the decision was based solely on the only independent state ground presented - mootness. This possibility eliminated, and notwithstanding the absence of an opinion from the Supreme Court of Louisiana, it follows that the Supreme Court concluded that written notice of the public hearing was not required - there is no other possible basis for the Supreme Court's decision.

Moreover, most recently in *Tulsa Professional Services,* this Court concluded that if actual notice is required, notice by mail is the preferred mechanism. "Actual notice need not be inefficient or burdensome. We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice." ___ U.S. ___, 108 S.Ct. at 1347.

As noted, it is conceivable, if not probable, that the Supreme Court of Louisiana accepted respondents' contention that the law of Louisiana does not require actual notice of administrative hearings adjudicating fundamental property rights. If so, the state court arrived at such a conclusion by one of two avenues. It either determined that notice by publication was sufficient, or, if actual notice is in fact required, the Commissioner's rules of procedure permitted the issuance of an adjudicative order even in the absence of actual notice.[5]

Thus, if the Supreme Court of Louisiana concluded that the law of Louisiana did not under any circumstances require actual notice of a public hearing called by the Commissioner for the purpose of considering an adjudicative order, then such a decision is fundamentally at odds with this Court's decisions in *Mullane, Mennonite,* and *Tulsa Professional Services.* There is no room under these decisions for a universally applicable state law dispensing with requirements of actual notice of an administrative hearing adjudicating fundamental property rights.

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[5] Respondents consistently argued in the state courts that the Commissioner's rules of procedure contain a "harmless error" rule (Rule 17) providing that any failure to comply with the rules shall not result in the invalidity of an order. Appendix H, at A-56. Thus, respondents contended that even if the Commissioner's rules of procedure called for actual notice, the failure to give actual notice cannot invalidate any order. The Court of Appeal flatly rejected this argument. Appendix D, at A-42 - A-43.

The decision of the Louisiana court is equally at odds with this Court's decisions if the state court concluded that the Commissioner was empowered to issue orders adjudicating property rights even if it is shown that persons entitled to notice did not receive actual notice. Such a decision is tantamount to empowering a state administrative body to engage in a wholesale trampling of fundamental rights guaranteed by the Constitution of the United States and similar provisions in state constitutions.

Mullane, Mennonite and *Tulsa Professional Services* have made clear that the issue of the sufficiency of notice is not subject to a single rule of universal application. Rather, the sufficiency of notice is evaluated in light of "the effect that requiring actual notice may have on important state interests," *Tulsa Professional Services,* ___ U.S. ___, 108 S.Ct. at 1346, and the reasonability of ascertaining the identity of persons affected by state action.

As in *Tulsa Professional Services,* the issue of whether petitioners' identity was reasonably ascertainable by Celeron cannot be answered on the record of this case. However, the Louisiana Court of Appeal unequivocally concluded that Celeron failed to make *any* effort to notify petitioners. Appendix D, at A-38. Unfortunately, the Supreme Court of Louisiana offered no guidence as to whether it accepted the Court of Appeal's conclusion that Celeron made no effort to notify petitioners. If the Supreme Court accepted the Court of Appeal's conclusion and nonetheless reversed the Court of Appeal, then the conflict with the decisions of this Court is even more striking because the Supreme Court of Louisiana has sanctioned state action affecting property rights not only in the absence of actual notice, but in the absence of any effort to provide actual notice.

Moreover, it cannot be contested that petitioners possess property rights that require constitutional protection. The Constitution of the United States protects property interests against arbitrary deprivation of property resulting from denial of due process rights. *In Re Selcraig,* 705 F.2d 789, 795-96 (5th Cir. 1983). Property interests are not created by the Constitution, but rather "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth,* 408 U.S. 564, 567 (1972).

In Louisiana, the holders of oil and gas leases and royalties have vested property rights. *Roberts v. United Carbon Co.,* 78 F.2d 39 (5th Cir. 1935); *Louisiana Land & Exploration Company v. Donnelly,* 394 F.2d 273 (5th Cir. 1968). Thus, the petitioners, as lessors, have the right to argue that their due process rights were violated when they did not receive notice.

This is consistent with the Supreme Court of Indiana's determination in *Short v. Texaco, Inc.,* 406 N.E.2d 625 (Ind. 1980), *aff'd,* 454 U.S. 516 (1982), that:

> Interests or estates in oil, gas, coal and other minerals lying beneath the surface of the land are interests in real estate for our purposes here, and as such are entitled beyond question to the firmest protection of the Constitution from irrational state action. They are vested property interests separate and distinct from the surface ownership. The State has no power to deprive an owner of such an interest without due process of law. They are entitled to the same protection as are fee simple titles. They are themselves of great utility and benefit to the society as a means of facilitating the development of natural resources.

406 N.E.2d at 627.

Mullane, Mennonite and *Tulsa Professional Services* each require that notice must be sufficient under the circumstances to assure that due process was served. Nothing short of actual notice would suffice here and certainly the Supreme Court of Louisiana's sanctioning of notice by publication cannot be legitimated.

II.

The decision of the Supreme Court of Louisiana will encourage state administrative agencies to disregard fundamental due process rights in violation of the Constitution of the United States and thus raises important issues.

The Court of Appeal concluded that notice by publication was insufficient. Appendix D, at A-39. Respondents in their application for writ of certiorari to the Supreme Court of Louisiana made clear their conviction that notice by publication is sufficient and support this position by stating that the "longstanding practice of the Commissioner of Conservation has been to satisfy the notice requirement of Section 6(B) by publishing the Legal Notice of the hearing in the official state journal. . . ." (Respondents' application for writ, Supreme Court of Louisiana, p. 26). Respondents went on to unequivocally conclude: "The Section 6 (B) notice requirement is complied with solely and exclusively by the Commissioner's publication in the official state journal of the Legal Notice . . . ." (*Id.* at p. 30). The Supreme Court of Louisiana's summary reversal of the Court of Appeal all but guarantees that this longstanding practice of notice by publication will continue.

Seven amici curiae were equally dogmatic in their view of the notice requirement.[6] In their joint brief in agreement with respondents' application for writ of certiorari they concluded: "This practice [notice by publication] . . . has long been recognized by regular practitioners before the Commissioner as the prescribed method of compliance with the notice requirement contained in Section 6(B)." (Amici Curiae Brief, p. 23).

Respondents and amici curiae further concluded that in a 1950 decision, *Sanders v. Flowers,* 218 La. 472, 49 So.2d 858 (1950), the Supreme Court of Louisiana held that notice by publication is sufficient.

The clear implication of the Supreme Court's reversal of the Court of Appeal is that in Louisiana, notice by publication remains sufficient to satisfy due process requirements — that there is no need to make any effort to provide actual notice. Thus, the purported longstanding practice of notice by publication stands as having survived scrutiny by the Supreme Court of Louisiana despite its failure to withstand the tests of due process espoused by this Court.

Should the "regular practitioners before the Commissioner" continue to follow this longstanding practice, the result can only be a continuing disregard of the fundamental due process rights recognized and defined by this Court in *Mullane, Mennonite,* and *Tulsa Professional Services.* Given that public hearings conducted by the Commissioner for the most part address basic property rights, as recognized by the Court in *Short v. Texaco, Inc., supra,*

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[6] Seven Louisiana law firms claiming to practice on a regular basis before the Commissioner of Conservation filed a joint brief in support of respondents' application for writ of certiorari to the Supreme Court of Louisiana.

continued adherence to the practice of notice only by publication virtually guarantees that "state action affecting property" will not be "accompanied by notification of that action. . . ." *Tulsa Professional Services,* ____ U.S. at ____, 108 S.Ct. at 1344.

The Supreme Court of Louisiana's apparent sanctioning of the longstanding administrative practice of providing notice by publication presents an important federal question that should be decided by this Court in order to avoid a wholesale disregard of fundamental due process rights.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that a writ of certiorari should issue, and, that the judgment of the Supreme Court of Louisiana should be reversed.

Robert L. Redfearn*
James A. Burton
John C. Herbert
Judy Perry Martinez
SIMON, PERAGINE, SMITH & REDFEARN
30th Floor, Energy Centre
1100 Poydras Street
New Orleans, LA 70163
Telephone: (504) 569-2030

*Counsel of record

APPENDIX A

STATE OF LOUISIANA
OFFICE OF CONSERVATION
BATON ROUGE, LOUISIANA

September 11, 1985

State of Louisiana
Department of Natural Resourses
Office of Conservation

ORDER NO. 1047-B

Order concerning the dissolution of the units created by Office of Conservation Order No. 1047, and the simultaneous creation of six (6) drilling and production units for the Upper Tuscaloosa Sand, Reservoir A, and a single drilling and production unit for the Upper Tuscaloosa Sand, Reservoir B in the IRENE FIELD, East Baton Rouge Parish, Louisiana.

Pursuant to power delegated under the laws of the State of Louisiana, and particularly Title 30 of Louisiana Revised Statutes of 1950, and after a public hearing held under Docket No. 85-495, in Baton Rouge, Louisiana, on July 23, 1985, upon the application of CELERON Oil & Gas Co., following legal publication of notice and notice in accordance with rules prescribed by the Commissioner of Conservation, the following order is issued and promulgated by the Commissioner of Conservation as being reasonably necessary to conserve the natural resources of the State, to prevent waste as defined by law, to avoid the drilling of unnecessary wells, and otherwise to carry out the provisions of the laws of this State.

DEFINITIONS

The Upper Tuscaloosa Sand, Reservoir A in the Irene Field is hereby defined as that gas and condensate bearing sand encountered between the interval of 17,575'—17,730', electric log measurements, in the CELERON Oil and Gas Company - Roland Kizer No. 1 well, located in Section 76, Township 5 South, Range 1 West, East Baton Rouge Parish, Louisiana.

The Upper Tuscaloosa Sand, Reservoir B, in the Irene Field, is hereby defined as that gas and condensate bearing sand encountered between the interval of 17,090'—17,210' electric log measurements, in the CELERON Oil and Gas Company - Davis No. 1 well, located in Section 72, Township 5 South, Range 1 West, East Baton Rouge Parish, Louisiana.

FINDINGS

The Commissioner of Conservation finds as follows:

1. That Office of Conservation Order No. 1047, effective November 21, 1978, established rules and regulations and created twenty (20) drilling and production units for the exploration for and production of gas and condensate from the 17,600' Tuscaloosa Sand, Reservoir A, in the Irene Field, East Baton Rouge Parish, Louisiana.

2. That the additional geological and engineering data obtained since the issuance of Office of Conservation Order No. 1047 indicates that the units created by such Order should be dissolved and simultaneously there should be created six (6) drilling and production units for the Upper Tuscaloosa Sand, Reservoir A and a single drilling and production unit for the Upper Tuscaloosa Sand, Reservoir B in the Irene Field, East Baton Rouge Parish, Louisiana.

3. That the creation of such units, reference Finding No. 2 hereof, is necessary to insure orderly development, to prevent waste, and to avoid the drilling of unnecessary wells.

4. That the available geological and engineering data indicates that the units shown on the plat labeled "State Exhibit A for Docket No. 85-495", a copy of which is attached hereto and made a part hereof are reasonable and should be adopted, that each unit can be efficiently and economically drained by one well located thereon, and that creation of such units should reasonably assure to each separate tract include therein an opportunity to recover its just and equitable share of the contents of the reservoirs.

5. That the separately owned tracts, mineral leases and other property interests within each of the units created herein should be force pooled and integrated with each separate tract sharing in unit production on a surface acreage basis of participation.

6. That the wells shown on the unit plat, reference Finding No. 4 hereof should be designated as the unit wells for the units created herein.

7. That CELERON Oil and Gas should be designated operator of U TUSC RA SUA, U TUSC RA SUB, U TUSC RA SUC, U TUSC RA SUD, U TUSC RA SUF, and U TUSC RB SUA; that Kaiser Energy, Inc. be designated operator of U TUSC RA SUE.

8. That any wells drilled to the Upper Tuscaloosa Sand, Reservoirs A and B, within or outside of the units created herein should be located in accordance with Statewide Order No. 29-E.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT:

1. The units created by Office of Conservation Order No. 1047, effective November 21, 1978, be and are hereby dissolved and simultaneously there are hereby created six (6) drilling and production units for the Upper Tuscaloosa Sand, Reservoir A and a single drilling and production unit for the Upper Tuscaloosa Sand, Reservoir B in the Irene Field, East Baton Rouge Parish, Louisiana, all for the exploration for and production of gas and condensate as shown on the plat labeled "State Exhibit A for Docket No. 85-495", a copy of which is attached hereto and made a part hereof.

The units have not been surveyed, and when a survey plat of said units showing the exterior limits thereof, the total acreage therein, and the acreage in each separately owned tract, has been submitted to and accepted by the Commissioner of Conservation or any member of his staff, insofar as it shows the exterior limits of the units, said plat shall be substituted for the above exhibit and made a part of this order by reference. In the event of conflicting claims of ownership of acreage in any unit, such acreage may be so identified on the survey plat. Such identification of acreage subject to conflicting claims shall not be construed as an acknowledgment of the validity of any such claims, and shall not affect any other acreage in separately owned tracts in the unit.

The survey plat shall be prepared in accordance with the requirements for unit plats and survey plats adopted by the Commissioner of Conservation and shall be submitted within ninety (90) days from the issuance hereof. It is recognized that the exterior boundary lines of the units, as

surveyed, may differ from those lines as shown on the attached plat because of the requirement that by survey the geologically significant wells be correctly located with respect to each other and to the unit boundary lines that they control.

2. The separately owned tracts, mineral leases and other property interests within each of the units created herein are hereby pooled, consolidated, and integrated in accordance with Section 10, Title 30 of Louisiana Revised Statutes of 1950, with each separate tract sharing in unit production in the proportion that the surface area of such tract bears to the entire surface area of the unit in which it is situated. Also, all operations on and production from each unit shall be considered operations on and production from each of the separate tracts within said unit and under the terms of each of the mineral leases affecting said tracts.

3. The unit wells for the units created herein are designated in accordance with Finding No. 6 hereof.

4. The operators of the units created herein are designated in accordance with Finding No. 7 hereof.

5. Any wells drilled to the Upper Tuscaloosa Sand, Reservoirs A and B, within or outside of the units created herein shall be located in accordance with Statewide Order No. 29-E.

6. Except as they may be in conflict herewith, the provisions of all applicable Statewide Orders shall apply to the units created herein.

7. When there is obtained additional geological and engineering information indicating a required change or revision in the unit boundaries as adopted herein, or which would indicate a required change or revision of other provisions of this order, the party or parties in possession of this

additional information shall petition the Commissioner of Conservation for a public hearing for the purpose of considering appropriate changes.

This Order shall be effective on and after July 23, 1985.

OFFICE OF CONSERVATION
OF THE STATE OF LOUISIANA

/s/ Herbert W. Thompson

HERBERT W. THOMPSON
COMMISSIONER OF CONSERVATION

JRA/rb
State Exhibit A
for Docket No. 85-495 -
Attached

Dis Un
R & R - Gas
NO

I, the undersigned, do hereby certify that I am an officer of the Office of Conservation of the State of Louisiana and that the copy of the record to which this certificate is affixed is a true copy of the original record on file in my office and in my custody.

In witness whereof I have hereunto set my hand this the 4 day of Dec., 1985.

I. B. Clark
Signature

District Mgr.
Official Title

I, the undersigned, do hereby certify that I am an officer of the Office of Conservation of the State of Louisiana and that the copy of the record to which this certificate is affixed is a true copy of the original record on file in my office and in my custody.

In witness whereof I have hereunto set my hand this the 9th day of Dec 1985

Signature

Official Title

APPENDIX B

KAISER ALUMINUM EXPLORATION COMPANY, PARK LANE ENTERPRISES, INC., EXPEC RESOURCES, LIMITED, ACME BRICK COMPANY, DAVID EWELL, LEIGHTON EWELL, ROSA McMILLAN, BETTY CRAIG, DOLESE CONCRETE COMPANY, LOUISIANA NATIONAL BANK, AS TRUSTEE FOR THE KIRK E. WILLIAMS, JR. INTER VIVOS TRUST AND BERNADETTE S. WILLIAMS INTER VIVOS TRUST, TOLMAK, INC., KANSAS CITY SOUTHERN RAILWAY COMPANY	*	19TH JUDICIAL DISTRICT COURT
VERSUS	*	DOCKET NUMBER: 294908 "B"
THE HONORABLE HERBERT W. THOMPSON, COMMISSIONER OF CONSERVATION AND ASSISTANT SECRETARY, OFFICE OF CONSERVATION OF THE STAFF [SIC] OF LOUISIANA	*	PARISH OF EAST BATON ROUGE
	*	STATE OF LOUISIANA

CONSOLIDATED WITH

CHEVRON U.S.A. INC.	*	19TH JUDICIAL DISTRICT COURT
VERSUS	*	DOCKET NUMBER: 294909 "G"

HERBERT W. THOMPSON, COMMISSIONER OF CONSERVATION	* * * *	PARISH OF EAST BATON ROUGE STATE OF LOUISIANA

* * * * * * * * * * * * * *

JUDGMENT

These consolidated cases having been duly tried and after adduction of testimony, production of evidence and considering the pleadings, arguments and briefs of counsel, the Court, believing the law and evidence to be in favor of the defendant, The Honorable Herbert W. Thompson, Commissioner of Conservation and the intervenors and against the plaintiffs, Kaiser Aluminum Exploration Company, Park Lane Enterprises, Inc., Expec Resources, Limited, Acme Brick Company, David Ewell, Leighton Ewell, Rosa McMillan, Betty Craig, Dolese Concrete Company, Louisiana National Bank, as Trustee for the Kirk E. Williams, Jr. Inter Vivos Trust and Bernadette S. Williams Inter Vivos Trust, Tolmak, Inc., Kansas City Southern Railway Company and Chevron U.S.A. Inc.;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendant, The Honorable Herbert W. Thompson, Commissioner of Conservation and the intervenors and against all of the plaintiffs in each of the above numbered and entitled suits, affirming Office of Conservation Order No. 1047-B dated September 11, 1985, and dismissing the claims of all such plaintiffs with full prejudice.

IT IS FURTHER ADJUDGED AND DECREED that all costs of these proceedings be assessed against the plaintiff.

Judgment Signed this 6th day of June, 1986 at Baton Rouge, Louisiana.

/s/ Frank Foil

JUDGE

FILED JUN 6 1986

FRIDAY, MAY 23, 1986

ORAL REASONS FOR JUDGMENT

REPORTER'S NOTE: (At this time counsel gave their closing arguments).

BY THE COURT:

Two suits are involved in this matter. One of these, 294,908, was filed by Kaiser Aluminum Exploration and others against the Commissioner of Conservation from the State of Louisiana. It was consolidated with No. 294,909, Chevron, U.S.A. against the Commissioner. These suits contest the validity of Order 1047B of the Commissioner of Conservation. Originally, a preliminary injunction was requested herein and that preliminary injunction was denied on December 5, 1985. There are basically three issues remaining to be decided in this case. They are as follows:

(1) Was there proper notice;

(2) The validity of the affective [sic] date of the order;

(3) The sand redefinition issue and the validity of the proceedings thereunder.

The standard of review in this case is set out in R. S. 30:12 (B)(5). In regard to the notice issue this Court feels that neither Louisiana nor Federal laws were violated in this case because all of the plaintiffs, except four, received proper notice and attended or participated at the hearing. Three of the unnoticed plaintiffs obviously had actual notice because of letters to the Commissioner, which listed these parties as not having received notice. R. S. 30:6 requires 30 days notice in the manner prescribed by the Commissioner. And legal notice was published in the official state journal more than 30 days prior to the hearing. The

Commissioner's rules of procedure require notice only after a reasonable search to obtain the names of those entitled to notice. Due process only requires the giving of notice beyond reasonable circumstances. Under the Circumstances in this case, over 1,800 interested parties received notice. Notice was posted at the Baker City Hall. Celeron requested a list of lessees from the Martin Exploration Company, who is a lessor in this area, and many other things throughout the record showing that there are evidencing reasonably [sic] efforts were made for proper notice.

Insofar as the affective [sic] date of the order is concerned the affective [sic] date of the order is July 23, 1985. This was the date in which the hearings were open. Although there have been briefs in regard to this matter, the Court really finds no violation of due process in the affective [sic] date being July 23rd, 1985.

The third issue of the sand redefinition. In light of the testimony in this case and all of the filings and all of the briefs, the Commissioner entered an order for sand redefinition. Considering the record, the Court feels that it is not authorized to subustitute [sic] its judgment for that of the Commissioner in this matter and that the proceedings thereunder were valid.

Accordingly, judgment is rendered herein dismissing both suits at plaintiffs' costs.

Judgment will be signed accordingly.

CERTIFICATE

I, DARLENE LEWIS, OFFICIAL COURT REPORTER, 19TH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, DO HEREBY CERTIFY THAT THE FOREGOING 3 PAGES CONSTITUTE A TRUE AND CORRECT TRANSCRIPT OF THE AFORESAID MATTER TO THE BEST OF MY KNOWLEDGE AND ABILITY.

WITNESS MY HAND, THIS 22ND DAY OF SEPTEMBER, 1986.

/s/ Darlene Lewis

DARLENE LEWIS
OFFICIAL COURT REPORTER
19TH JUDICIAL COURT

APPENDIX C

KAISER ALUMINUM EXPLORATION COMPANY, Park Lane Enterprises, Inc., Expec Resources, Limited, Acme Brick Company, David Ewell, Leighton Ewell, Rosa McMillian [sic], Betty Craig, Dolese Concrete Company, Louisiana National Bank, as Trustee for the Kirk E. Williams, Jr. Inter Vivos Trust and Bernadette S. Williams Inter Vivos Trust, Tolmak, Inc., Kansas City Southern Railway Company

v.

The Honorable Herbert W. Thompson, Commissioner of Conservation and Assistant Secretary, Office of Conservation of the Staff [sic] of Louisiana.

CHEVRON U.S.A. INC.

v.

Herbert W. THOMPSON, Commission of Conservation.

Nos. CA/86/1277, CA/86/1278.

Court of Appeal of Louisiana,
First Circuit.

Aug. 18, 1987.

Plaintiffs sought judicial review of conservation order. The Nineteenth Judicial District Court, Parish of East Baton Rouge, Frank Foil, P.J., entered judgment against plaintiff. Plaintiffs appealed devolutively. The Court of Appeal, Savoie, J., held that appeal from conservation order was not moot.

Motion to dismiss appeal denied.

R.L. Redfearn, John C. Herbert, New Orleans, for plaintiff-appellant Kaiser Aluminum Exploration Co. Dolese Concrete Co., LNB as Trustee for the Kirk E. Williams, Inter Vivos Trust and Bernadett [sic] S. Williams, Inter Vivos Trust, Rosa E. McMillian [sic], Elizabeth E. Craig, Leighton B. Ewell, David Ewell, Park Lane Enterprises, Inc., Expec Resource, Ltd.

H. H. Hillyer, Jr., Taylor Darden, New Orleans, for Chevron USA, Inc.

David Devillier, Eunice, for defendant-appellee Herbert W. Thompson, Com'n of Conservation.

Lawrence E. Donohoe, Jr., Lafayette, for intervenor-appellee Celeron Oil and Gas Co.

R. Gordon Kean, Jr., Baton Rouge, for intervenor-appellee Rolfe McCollister, Sr., and T.N. Samuel.

Before GROVER L. COVINGTON, C.J., and SAVOIE and LeBLANC, JJ.

SAVOIE, Judge.

Defendant-appellees have filed a motion to dismiss this appeal on grounds of mootness.

By Office of Conservation Order Number 1047, dated effective November 21, 1978, the Commissioner of Conservation defined the 17,600' Tuscaloosa Sand, Reservoir A, and created twenty drilling and production units for the area by Order 1047-A, dated effective September 18, 1979, the Commissioner created five additional drilling and production units of the 17,600' Tuscaloosa Sand, Reservoir A. A subsequent Order, 1047-A-1, dated effective June 26,

1982, created one additional drilling and production unit for the 17,600' Tuscaloosa Sand, Reservoir A.

By letter dated May 17, 1985, Celeron Oil & Gas Company sought changes in the above orders. Specifically, Celeron sought to redefine the 17,600' Tuscaloosa Sand (Reservoir A), into two reservoirs, to dissolve the units previously created, and to create revised drilling and production units. Pursuant to Celeron's application a hearing was held on July 23-25, 1985, and Order 1047-B was issued, dated effective July 23, 1985. Order 1047-B dissolved the twenty units for the 17,600' Tuscaloosa Sand, Reservoir A, which had been created by Order 1047. In addition, it defined the Upper Tuscaloosa Sand, Reservoir A and B, and created six drilling and production units for the Upper Tuscaloosa Sand, Reservoir A and one drilling and production unit for the Upper Tuscaloosa Sand, Reservoir B.

Judicial review of 1047-B was sought in district court (suit number 294,908), by Kaiser Aluminum Exploration Company, Park Lane Enterprises, Inc., Expec Resources, Limited, Acme Brick Company, David Ewell, Leighton Ewell, Rosa McMillian [sic], Betty Craig, Dolese Concrete Company, Louisiana National Bank, as Trustee for the Kirk E. Williams, Jr. Inter Vivos Trust and Bernadette S. Williams Inter Vivos Trust, Tolmak, Inc., and Kansas City Southern Railway Company. Judicial review of Order 1047-B was also sought in district court (suit number 294,909) by Chevron U.S.A. Inc. Judgment was rendered against plaintiffs on June 6, 1986. Thereafter, plaintiffs appealed devolutively to this court.

On appeal plaintiff-apellants raise three main issues. First, some of the plaintiffs contend they did not receive adequate notice of the July 23, 1985, hearing which resulted in the issuance of Order 1047-B. Second, plaintiffs

argue Order 1047-B is invalid because the Commissioner failed to state his reasons for redefining the sand and because the redefinition leads to waste in violation of La.R.S. 30:1 et seq. Third, plaintiffs contend the order is invalid because the hearing was held July 23 through July 25, 1985, but the order was dated effective July 23 rather than July 25.

After plaintiffs filed the above appeal, the Commissioner issued Order 1047-B-1, dated effective November 18, 1986. Order 1047-B-1 dissolved the five drilling and production units in the 17,600' Tuscaloosa Sand, Reservoir A, which had been created by Order 1047-A. However, Order 1047-B-1 ordered no change in the drilling and production units in the Upper Tuscaloosa Sand, Reservoirs A and B, which had been created by Order 1047-B. Finally, Order 1047-B-2, dated effective December 11, 1986, dissolved the drilling and production units created for the Upper Tuscaloosa Sand, Reservoirs A and B, which had been created by Order 1047-B, and created a single reservoir-wide unit for the Upper Tuscaloosa Sand, Reservoir A. The sixty day delay for seeking judicial review of 1047-B-1 and 1047-B-2 has expired.

Defendant-appellees have filed this motion to dismiss the appeal, contending plaintiff-appellants' appeal of Order 1047-B should be dismissed because it is moot.

In urging this motion to dismiss defendant-appellees have three main arguments. First, they argue that once a conservation order is superceded by subsequent orders, any appeal as to the validity of the original order becomes moot. Second, they contend plaintiff-appellants have "twice received the relief they requested" on appeal. Third, defendant-appellees argue the appeal is moot because plaintiffs took a devolutive rather than a suspensive appeal.

In the first argument, defendant-appellees argue that once a conservation order that is the subject of an appeal is superceded by subsequent orders, the validity of the order at issue becomes moot. They cite *Hunter Co. v. McHugh*, 320 U.S. 222, 64 S.Ct. 19, 88 L.Ed. 5 (1943). In *Hunter*, the plaintiff sought judicial review of Order 28-B, which had been issued by the Commissioner of Conservation. Plaintiff argued Order 28-B was invalid because it was issued pursuant to an unconstitutional legislative act.

Specifically, plaintiff argued order 28-B was invalid because the order made no provision for the payment of the reasonable value of plaintiff's lease and for reimbursing plaintiff for the cost of development of the gas, including the cost of drilling its well and laying its pipeline. After plaintiff had filed its appeal, the Commissioner issued Orders 28-C and 28-C-10. According to Order 28-C-10, plaintiff was entitled to all proceeds from the well (after deduction of royalties and production costs) until it had recovered the costs of drilling the well and laying the pipeline. In addition, the order stated the balance of the proceeds should be distributed among the landowners within the unit in proportion to their acreage within the unit.

After 28-C-10 was issued, the appellee in *Hunter* filed a motion to dismiss the appeal as moot. Without defining "moot", the U.S. Supreme Court stated:

> The cause has thus become moot so far as it is concerned with order No. 28-B and this Court, in reviewing on appeal the judgment of the State Supreme Court is not free to, and will not adjudicate the constitutionality of orders No. 28-C and No. 28-C-10 where the state court whose judgment is under review has had no opportunity

> to pass upon their validity under state law or the Constitution of the United States. (Citations omitted) A minority of the Court are of the opinion that in these circumstances there is no outstanding order which this Court can review and that the appeal should for that reason alone be dismissed.
>
> In the present posture of the record, so far as the appeal seeks to bring before us for review the judgment of the state court sustaining the constitutionality of the statute, the record presents no substantial federal question.
>
> 320 U.S. 222 at 227, 64 S.Ct. 19 at 21, 88 L.Ed. 5.

Although the Court does refer to the cause as moot, the case was ultimately dismissed for want of a properly presented substantial Federal question.

[1] In any event, recent U.S. Supreme Court cases have more fully defined the concept of mootness. In *County of L.A. v. Davis,* 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979), the Court stated a case is moot when there is no reasonable expectation that the alleged violation will recur and when interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. When both of the above conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law. *County of L.A., supra.*

[2] According to Louisiana jurisprudence, a moot case is one which, when rendered, can give no practical relief. Courts will not rule on questions of law which have

become moot since their decree will serve no useful purpose and afford no practical relief. *Buchanan v. State Civil Service Commission,* 372 So.2d 1065 (La. App. 1st Cir. 1979).

[3] In the present appeal plaintiff-appellants have raised three main issues: the notice requirement was not met; the Commission erred when it defined the Upper Tuscaloosa Sand; and Commission erred in making the effective date of the order July 23 rather than July 25. If on appeal any one of these three issues is resolved in favor of plaintiff-appellants, it could result in the invalidation of Order 1047-B and the redistribution of royalties. This fulfills the requirement that there be "practical relief" that the court can render. See *In the Matter of Delahoussaye,* 402 So.2d 308 (La.App. 1st Cir 1981), writ denied, 413 So.2d 494 (La. 1982).

[4] In appellees' second main argument for dismissal of the appeal, they contend plaintiff-appellants have "twice received the relief they requested" on appeal. Specifically, defendant-appellees contend that because subsequent hearings were held before the Commissioner (hearings for Orders 1047-B-1 and 1047-B-2) plaintiffs have been accorded relief.

There is no merit to this argument. The hearings held prior to the issuance of Orders 1047-B-1 and 1047-B-2 were not for the purpose of reviewing Order 1047-B. They were to assess the status of the sand definition and unitization at the time they were held. It is clear that Orders 1047-B-1 and 1047-B-2 not only did not address plaintiffs' complaints, but also could not have addressed plaintiffs' complaints.

[5,6] In the third main argument, defendant-appellees argue the appeal is moot because plaintiffs took

a devolutive rather than a suspensive appeal. Defendants contend that if this court addressed plaintiffs' assignments of error, found in plaintiffs' favor, and invalidated Order 1047-B, this would be converting the devolutive appeal into a suspensive appeal. This argument is also without merit. The nature of a devolutive appeal is that it can, if it has merit, result in a reversal of the trial court judgment, despite the fact the trial court judgment has been effective pending the appeal process.

For the foregoing reasons we find the issues herein are not moot, therefore the motion to dismiss the appeal is denied.

MOTION TO DISMISS APPEAL DENIED.

APPENDIX D

KAISER ALUMINUM EXPLORATION COMPANY, et al.

v.

The Honorable Herbert W. THOMPSON, Commissioner of Conservation and Assistant Secretary, Office of Conservation of the State of Louisiana.

No. 86 CA 1277/78.

Court of Appeal of Louisiana,
First Circuit.

Feb. 23, 1988.

As Amended March 30, 1988.

Writ Granted May 20, 1988.

Interested parties sought judicial review of order redefining gas and condensate bearing sand reservoirs and changing drilling and production units. The 19th Judicial District Court, Parish of East Baton Rouge, Frank Foil, J., upheld validity of the Commissioner of Conservation's order and dismissed action, and appeal was taken. The Court of Appeal, Savoie, J., held that: (1) actual notice of hearing on application for redefinition to property owner did not constitute actual notice to unnoticed co-owners; (2) applicant for redefinition did not conduct reasonable search or make reasonable effort to provide notice to interested parties in 8 of 20 existing drilling and production units, and accordingly, applicant did not comply with Commissioner's procedural rules requiring notice; and (3) substantial rights of interested unnoticed parties were prejudiced by lack of notice.

Reversed.

R.L. Redfearn, John C. Herbert, New Orleans, for 1st plaintiff-appellant Kaiser Aluminum Exploration Co. Dolese Concrete Co., LNB as Trustee for the Kirk E. Williams, Jr. Inter Vivos Trust and Bernadett [sic] S. Williams Inter Vivos Trust, Rosa E. McMillian [sic], Elizabeth E. Craig, Leighton B. Ewell, David Ewell, Park Lane Enterprises, Inc., Expec Resource, Limited, 2nd plaintiff-appellant.

H. H. Hillyer, Jr., Taylor Darden, New Orleans, for Chevron USA, Inc., 1st plaintiff-appellant.

David Devillier, Eunice, for defendant-appellee Herbert W. Thompson, Commissioner of Conservation.

Lawrence E. Donohoe, Jr., Lafayette, for intervenor-appellee Celeron Oil and Gas Co.

R. Gordon Kean, Jr., Baton Rouge, for intervenor-appellee Rolfe McCollister, Sr., and T.N. Samuel.

Before COVINGTON, C.J., and SAVOIE and LeBLANC, JJ.

SAVOIE, Judge.

In these consolidated actions, the plaintiffs-appellants seek judicial review of Order 1047-B issued by the Office of Conservation of the State of Louisiana. Plaintiffs-appellants are Kaiser Aluminum Exploration Company; Park Lane Enterprises, Inc.; Expec Resources, Limited; David Ewell; Leighton Ewell; Rosa McMillan; Betty Craig; Dolese Concrete Company; Louisiana National Bank, as trustee for the Kirk E. Williams, Jr. Inter Vivos Trust and Bernadette S. Williams Inter Vivos Trust,

and Chevron U.S.A., Inc.[1] Defendant-appellee is Herbert W. Thompson, Commissioner of Conservation. Also appellees are intervenors on the side of the defendant, who are Celeron Oil & Gas Company; First Energy Corporation; Union Texas Petroleum; Terra Resources, Inc.; Borden, Inc.; and TXO Production Corporation.[2]

By Office of Conservation Order 1047, dated effective November 21, 1978, the Commissioner of Conservation defined the 17,600' Tuscaloosa Sand, Reservoir A, Irene Field, as that gas and condensate bearing sand between the intervals of 17,575'—19,112'. Order 1047 also created twenty drilling and production units (A-T) for the sand. By Order 1047-A, dated effective September 18, 1979, the Commissioner created five additional drilling and production units (U-Y) for the sand. A subsequent Order, 1047-A-1, dated effective January 26, 1982, created one additional drilling and production unit (Z).

On May 17, 1985, Celeron Oil & Gas Company (Celeron) gave written notice that a pre-hearing conference would be held on June 6, 1985 to consider its proposed application to redefine the 17,600' Tuscaloosa Sand, Reservoir A, Irene Field, into two reservoirs; to dissolve the units previously created by Order 1047; and to create revised drilling and production units. Pursuant to Celeron's application, a hearing was held on July 23-25, 1985, and Order 1047-B was issued, dated effective July 23, 1985. Order 1047-B redefined the sand created by Order 1047 into two reservoirs—Reservoir A between the interval of

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[1] Originally, Acme Brick Company, Tolmak, Inc., and Kansas City Southern Railway Company were also plaintiffs. They have not joined in the appeal of the trial court decision.

[2] Rolfe McCollister, Sr., and F.N. Samuel originally intervened on the side of the Commissioner, but did not appeal the trial court decision.

17,575'-17,730', and Reservoir B between the interval of 17,090'-17,210'; dissolved the twenty units created by Order 1047; created on a non-geographic basis six units for the Upper Tuscaloosa Sand, Reservoir A, and a single drilling and production unit for the Upper Tuscaloosa Sand, Reservoir B.

From this order, plaintiffs sought injunctive relief and judicial review in district court. On June 6, 1986, the trial court upheld the validity of the Commissioner's order and dismissed the plaintiffs' action. Plaintiffs then filed this appeal. Subsequently, the Commissioner issued Order 1047-B-1, dated effective November 18, 1986.

Order 1047-B-1 dissolved the five drilling and production units in the 17,600' Tuscaloosa Sand, Reservoir A, which had been created by Order 1047-A. However, Order 1047-B-1 ordered no change in the drilling and production units in the Upper Tuscaloosa Sand, Reservoirs A and B, which had been created by Order 1047-B. Finally, Order 1047-B-2, dated effective December 11, 1986, dissolved the drilling and production units created for the Upper Tuscaloosa Sand, Reservoirs A and B, which had been created by Order 1047-B, and created a single reservoir-wide unit for the Upper Tuscaloosa Sand, Reservoir A. Orders 1047-B-1 and 1047-B-2 are final, as the sixty day delay for seeking judicial review of 1047-B-1 and 1047-B-2 expired without any party seeking review.

On the basis of these subsequent orders, defendant-appellees filed a motion to dismiss plaintiffs' appeal on the grounds of mootness. This court denied the motion to dismiss the appeal. *Kaiser Aluminum Exploration Company v. Thompson*, 512 So.2d 1197, 1200 (La. App. 1st Cir. 1987).

[1] We note, however, that due to the subsequent orders, Order 1047-B only controlled the approximately sixteen month period from July 23, 1985 through November 18, 1986.

On appeal, plaintiffs-appellants urge the following assignments of error:

> 1. The district court erred in finding that adequate notice of the proposed hearing before the Commissioner of Conservation to revise units previously formed by the Commissioner for the Irene Field had been given.
>
> 2. The district court erred in failing to find that Order Number 1047-B was issued by the Commissioner of Conservation in violation of LSA-R.S. 30:6 and Rules 3 and 7 of the Commissioner of Conservation's Rules of Procedure.
>
> 3. The district court erred in failing to find that Order Number 1047-B was issued by the Commissioner of Conservation in violation of LSA-R.S. 49:950 et seq.
>
> 4. The district court erred in failing to find that Order Number 1047-B was issued by the Commissioner of Conservation in violation of appellants' due process rights under the United States and Louisiana Constitutions.
>
> 5. The district court erred in failing to find that the absence of a Statement of the Underlying Facts supporting Order Number 1047-B's Findings invalidated it.
>
> 6. The district court erred in not finding that Order Number 1047-B is invalid because it

violates the provisions of LSA-R.S. 30:3 in that in redefining the pool for the Irene Field it excludes known productive strata and thereby encourages waste and the drilling of unnecessary wells.

7. The district court erred in finding that the fact that the effective date of Order Number 1047-B predated the adjournment of the hearing did not invalidate it.

Because we find assignments of error numbers 1 and 2 have merit, we pretermit discussion on assignments of error numbers 3 through 7.

Judicial review of an order of the Commissioner is governed by LSA-R.S. 30:12 B (5), which reads as follows:

> The court may affirm the decission of the assistant secretary or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) In violation of constitutional or statutory provisions;
>
> (b) In excess of the statutory authority of the agency;
>
> (c) Made upon unlawful procedure;
>
> (d) Affected by other error of law;
>
> (e) Arbitrary or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion;
>
> or
>
> (f) Manifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record. In the application of the

> rule, where the assistant secretary has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the assistant secretary's determination on credibility issues.

Plaintiffs-appellants contend in part that the Commissioner failed to follow the statutes and rules of procedure regarding notice. LSA-R.S. 30:6B provides as follows:

> No rule, regulation, order, or change, renewal, or extension thereof, shall, in the absence of an emergency, be made by the commissioner under the provisions of this Chapter except after a public hearing upon at least ten days' notice given in the manner and form prescribed by him. This hearing shall be held at a time and place and in the manner prescribed by the commissioner. The commissioner, in his discretion, may designate a member of his staff to conduct public hearings on his behalf. Any person having an interest in the subject matter of the hearing shall be entitled to be heard. Whenever any application shall be made to the commissioner of conservation for creation, revision, or modification of any unit or units for production of oil or gas, ... the applicant shall be required to file with the application two copies of a map of such unit or units or well spacing pattern or two explanations of such plan of cycling, pressure maintenance or restoration, or other secondary recovery program and *at least thirty days' notice shall be given of the hearings to be held thereon, in the manner prescribed by the commissioner of conservation* and a copy of such plat or explanation or program shall remain on file in the office of conservation in Baton

Rouge and in the office of the district manager of the conservation district in which the property is located, and be open for public inspection, at least thirty days prior to such hearing. (Emphasis ours).

The Commissioner has adopted Rules of Procedure for hearings to be held before him. Pertinent rules are as follows:

RULE 1—DEFINITIONS

INTERESTED OWNER—shall mean any owner as owner is defined in Title 30 of Louisiana Revised Statutes of 1950, who is known to the applicant *after reasonable search* to presently own an interest within the area of, or proximate to, the tracts directly affected by the application. (Emphasis ours).[3]

RULE 2—APPLICABILITY

These Rules of Procedure shall be applicable to all hearing applications which require thirty (30) days notice as set forth in Section 6B of Chapter 1 of Title 30 of the Louisiana Revised Statutes of 1950....

RULE 3—PRE-APPLICATION NOTICE

Except as provided by Rule 8, any person intending to apply for a hearing, prior to filing application, shall send a notice outlining the proposal to the Commissioner ... with a copy ... to each Interested Owner and Represented Party....

---

[3] LSA—R.S. 30:3(8) defines "owner" as:

[T]he person who has the right to drill into and to produce from a pool and to appropriate the production either for himself or for others.

Each pre-application notice shall include or be accompanied by the following:

a. A list of the names and addresses of all Interested Owners and Represented Parties to whom it it is being sent.

b. A statement that a reasonable effort has been made to determine to whom the notices as required by this rule must be sent.

....

RULE 7—HEARING APPLICATION

The hearing application may be filed immediately after the pre-application conference or as otherwise provided in Rules 3 and 5 and shall be filed with the Commissioner (in duplicate) with a copy to the District Manager and to each Interested Owner and Represented Party.... In addition to outlining the purpose thereof, the application shall include or be accompanied by the following:

a. A list of the names and addresses of Interested Owners and Represented Parties notified, as required by Rule 3(a).

b. A list of the names and addresses of all Interested Parties who are known to the applicant *after reasonable search.* In addition to the publication of the Legal Notice by the Commissioner in the official state journal, the applicant shall provide for posting of a copy of the Legal Notice of the hearing and unit plat or plats in a prominent place in the area affected and publication of a copy of the Legal Notice in a newspaper published in the vicinity or general area of the affected field at least fifteen (15) days before the hearing. The applicant shall mail copies of the Legal Notice to all Interested Owners, Represented Parties and Interested Parties and a copy of the unit plat or plats shall

> be included with the Legal Notice, if said parties have not already been furnished same. Evidence to establish posting, publishing and mailing shall be submitted at the hearing.
>
> c. A statement that a reasonable effort has been made to obtain a complete list of Interested Parties, Interested Owners and Represented Parties. (Emphasis ours).

These Rules apply to the plaintiffs-appellants because they are "interested owners" as defined by Rule 1 of the Commissioner's rules.

The trial court found that the plaintiffs-appellants had received proper notice:

> [T]his court feels that neither Louisiana nor Federal laws were violated in this case because all of the plaintiffs, except four, received proper notice and attended or participated at the hearing. Three of the unnoticed plaintiffs obviously had actual notice because of letters to the Commissioner, which listed these parties as not having received notice. R.S. 30:6 requires 30 days notice in the manner prescribed by the Commissioner and legal notice was published in the official state journal more than 30 days prior to the hearings. The Commissioner's rules of procedure require notice only after a reasonable search to obtain the names of those entitled to notice. Due process only requires the giving of notice beyond reasonable circumstances. Under the circumstances in this case, over 1,800 interested parties received notice. Notice was posted at the Baker City Hall. Celeron requested a list of lessees from the Martin Exploration Company, who is a lessor in this area, and many other things throughout the record showing that there are

> evidencing reasonably [sic] efforts were made for proper notice.

Those plaintiffs alleged to have received no notice of the hearing are: Leighton Ewell, Rosa McMillan, Betty Craig, and Dolese Concrete Company. All four of these parties are land owners in Units S and T. At the preliminary injunction hearing in the district court, Mrs. Craig testified that she received no notice of the prehearing application conference called by Celeron, or of the July 23 hearing; she also stated that she did not attend the hearing. Mrs. Craig testified that she first received notice that there had been a hearing on October 20, when she was informed of the matter through a neighbor. It was stipulated that the direct testimony of Mrs. McMillan and Mr. Ewell would be the same as that of Mrs. Craig.

The trial judge determined that these three plaintiffs had actual notice based on a letter written by legal counsel for Kaiser on July 17, 1985, and sent to the Commission which reads in pertinent part:

> Rule 3 requires applicant to send a preapplication notice to each Interested Owner and Represented Party. A reasonable effort must be made to determine the names and addresses of said people.
> It has come to our attention that certain Interested Owners and Represented Parties were not put on Applicant's list and did not receive the pre-application notice. These neglected people include:
>
> > Mary Mercedes Ewell Pugh, Dave Haas Ewell, Jr., Leighton Banks Ewell, Edmond Quik Ewell, Rosa Dennis Ewell McMillan, Elizabeth Ann Ewell Craig, Lola Dee Ewell McElyea, Martha Louise Ewell Greer, and other members of the Ewell family. All included

> within SU S and SU T of the Irene Field.
>
> Rule 7 requires applicant to prepare an additional list of all Interested Parties after reasonable search, and to mail to all people on both lists a copy of the Legal Notice and the plat, if not previously furnished.
>
> The Interested Owners and Represented Parties previously neglected still are not on applicant's list, and did not receive the Legal Notice and plat.

The letter went on to request that based on the lack of notice, the July 23 hearing be canceled and a new hearing date be set after proper notice. From the letter, the trial court apparently concluded that the individuals listed must have been contacted in order to determine whether they had in fact received notice and that as a result of having been contacted, these individuals received actual notice.

[2,3] However, there is testimony in the record which directly contradicts the trial court's conclusion. Defendant-appellees introduced excerpts of the deposition of Ken Miller, a representative of Kaiser Aluminum. Mr. Miller testified that he had supplied Kaiser's attorney with the names which appeared in Kaiser's letter of July 17, 1985 to the Commissioner, which dealt with those interested owners who had not been noticed. Mr. Miller gave the names to Kaiser's counsel because he "had dealt with the Ewells [all those parties named in the letter are members of the Ewell family] previously in the area and I noticed their name was not on the applicants [sic] list of notice parties." Mr. Miller further testified that he did contact Edmond Ewell in July of 1985, the member of the Ewell family who lives on the property, and asked him if he was aware of the July 23 hearing; Mr. Ewell told Mr. Miller that he was not aware of the hearing. Mr. Miller's testimony clearly shows

that while he did contact Edmond Ewell in order to determine whether he had received notice of the July 23 hearing, Mr. Miller did not contact Mr. Leighton Ewell, Mrs. McMillan or Mrs. Craig.[4] Thus, these three plaintiffs did not receive actual notice of the hearing through being contacted in order to determine if they had received notice of the hearing. We find that the trial court was clearly wrong in concluding that the letter shows that three of the plaintiffs received actual notice of the hearing. Our examination of the record shows that when Kaiser received Celeron's application for a hearing, it concluded that based on the Commissioner's Rules of Procedure, those parties listed by Celeron received notice and that those parties not listed were not notified. One of those parties not noticed was contacted by a Kaiser representative, and he verified that he had not received notice. The remaining members of the Ewell family were never contacted by the Kaiser representative.

A representative of the Dolese Concrete Company, the fourth unnoticed plaintiff, also testified. James Hayward testified that Dolese received no notice of the pre-application conference on June 6, or of the hearing on July 23. He further testified that no one from Dolese attended the hearing. Mr. Hayward testified that he was not informed of the hearing until November 1985.

---

[4] Defendant-appellees contend that actual notice to Edmond Ewell constitutes actual notice to the unnoticed plaintiffs, citing the case of *Poirier v. Burton-Swartz Cypress Co.*, 127 La. 936, 54 So. 292 (1911). However, the *Poirier* case is distinguishable from the case before us. In *Poirier*, where the actual knowledge of one co-owner was imputed to the remaining three co-owners, the co-owner with actual knowledge was the representative of the other co-owners because they had delegated to him the responsibility of looking after the property. In the case before us, while Edmond Ewell did lease a portion of the land to live on, he did not manage the property or act as agent for each of his co-owners; each co-owner administered his interest individually.

The Commissioner's Rules of Procedure require an applicant, such as Celeron, to attach statements to the pre-application notice and the hearing application notice that a reasonable effort has been made to determine to whom the required notices must be sent. Celeron attached these statements to its notices. The testimony introduced at the preliminary injunction hearing shows that George Harris, a landman for Celeron, was the person to whom the responsibility of ascertaining those parties to be noticed was delegated. The deposition of Mr. Harris was introduced at the preliminary injunction hearing. Mr. Harris was first questioned about the land map of Irene Field which Celeron possessed. According to Mr. Harris, the map encompasses twelve square miles, or the twelve units which Celeron originally sponsored, and one additional unit to the west. Celeron used the map to compile a list of names and addresses of lessors and owners of the land within this twelve square mile area. Mr. Harris was then questioned about the July 23, 1985 hearing. Mr. Harris was told by Mr. Todd, his boss, to compile a list for Celeron's attorneys to use in making an application to the Commissioner for a hearing. Mr. Harris testified:

> I asked him [Mr. Todd] if we [Celeron] had to notify all those people that were in the units that were dry and the units that had produced a while and quit that I knew weren't in the geological area, as such, and he suggested I call Mr. Donohoe [counsel for Celeron]. And I called Mr. Donohoe, and he said, 'Get everybody.' So, I used, basically, the list that had been built from the beginning, you know, everyone. There's 1886 people on that list.

Mr. Harris' testimony continued as followed:

> QUESTION [by Mr. Redfearn, counsel for Kaiser

Aluminum] Mr. Donohoe told you to get everybody that is involved in the matter referred to in the letter of May 17, 1985; is that right?

ANSWER That's not the way it was said. He said—I said, 'I'm supposed to get a list for this hearing.' And he—I said, 'Do we get only those people who are involved in the producing units or do we get the ones that are no longer productive or were dry?' And he said, 'Get everybody.'

QUESTION And in getting everybody, what did you do after you had gotten your instructions from Mr. Donohoe?

ANSWER I used the list that had been compiled and brought up to date through the years.

QUESTION So it was simply a matter of your going to the list which had been compiled through the years; is that correct?

ANSWER Yes sir.

After further statements that he used the lists and maps which Celeron had possessed as to its 12 units, Mr. Harris testified as follows:

QUESTION [By Mr. Redfearn, counsel for Kaiser Aluminum] Did you make any attempt, whatsoever, to find out the ownership of minerals and leases in what are designated as Sand Unit R, S, T?

ANSWER No, sir. The only attempt we made as to any acreage within those units would be where leases from Martin or someone else crossed the line.

QUESTION So the—

ANSWER Our leases, for instance, we may have had some that went into those areas. Those are the only people that are on that list.

QUESTION So, you made no attempt at all, other than what you have just discussed, to find out the ownership in R, S, T, Q, P?

ANSWER Yes. We didn't buy abstracts and examine titles to competitor leases within these areas, much less out here where we had no interest.

QUESTION Why did you not make any attempt to ascertain who these people were for purposes of your list attached to the letter of May 17, 1985?

ANSWER They had never been in any of these lists from the time of the beginning that I knew of, and I didn't think it was necessary.

....

QUESTION [By Mr. Redfearn] So, since you were not instructed to find out the ownership of those various units early on, you made no attempt to—other than talk to Martin Exploration Company—to find out the owners, the interested owners, the interested parties, and the represented owners in those units?

ANSWER I did not.

QUESTION Were you aware of the fact that Celeron was requesting that these units, R, S, T, Q, P, B,—be dissolved?

ANSWER I must have read that in—I mean, I must have read that they were going to dissolve the units, but it didn't really dawn on me that they were dissolving all of them until I got to the hearing.

....

QUESTION [By Mr. Redfearn] Mr. Harris, am I correct that the reason that you called Bob Martin of Martin Exploration Company to ascertain names and addresses of mineral owners, et cetera, was solely to find out the

names and addresses of those parties who fell within the 12 units originally sponsored by Celeron in 1978?

MR. ABELL: [counsel for Celeron] Before you answer I want to ask are you talking about what the intent of Mr. Harris was or what he said to Mr. Martin?

MR. REDFEARN: I am asking what was his intent was and what was he trying to do.

MR. ABELL: There could be a difference between what he said to Mr. Martin and what he had in his mind.

MR. REDFEARN: (CONTINUING)

QUESTION Let us start with your intent.

ANSWER I was trying to get a list from him to see if I had all of the people on my list that he had as royalty owners. And it—so as I recall, I did have

QUESTION But when you say that, you were not trying to ascertain his royalty owners in units R, S, T, Q, P, were you?

ANSWER I wouldn't say that I was, because I didn't think people that were down there were interested in this.

QUESTION Am I correct in my understanding that you made no attempt to find out any of the owners, interested parties, mineral owners, royalty owners, overriding—

ANSWER I didn't buy abstracts, I didn't send brokers to the courthouse to check—or to the tax records to check those no man's land leases.

QUESTION And those fall, am I correct, in units Q, P, R, S, T?

ANSWER Yes. And out there on the east side, too.

QUESTION And, also, units M, N, O?

ANSWER Yes. There are some people who were noticed in those units, but only those that we knew about. And because, like, Mr. Todd says; there are numerous subdivisions in there and also down in here that it would probably be impossible in record checking to determine all of the people in those units.

QUESTION Is it difficult to find a 27 acre tract in a 640 acre unit?

ANSWER For an experienced man, I don't think it was if he was looking for it.

QUESTION What about a hundred acre tract?

ANSWER I think I could find one.

A review of the testimony of Mr. Harris, the party responsible for compiling a list of those to be notified for the July 23 hearing, shows that Celeron made no attempt to notify those parties with mineral interests in Units M-T, except where leasehold interests in Units M-T crossed over into Units A-L. This conclusion is further supported by Celeron's attorney's statements to the Commissioner at the July 23 hearing. The Commissioner, prior to the hearing on the merits, took up the issue of whether proper notice had been given. Celeron's attorney stated that Celeron had made a reasonable effort "to notify everyone, not only in the units affected, but in the band around those units." The attorney further stated that notice to those who were not in the affected units (A-J being the affected units) was not necessary because "we're [Celeron] not asking for those undrilled units, for those units other than A through J to be revised." Yet, as was pointed out by the Commissioner's attorney, Celeron was asking to have all twenty drilling and production units dissolved, not simply Units A through J.

Thus, the only notice which was given as to those

parties in units M through T was the publication of the notice in the State-Times, the official state legal journal, on June 15, 1985 and July 2, 1985, and the posting of the notice in the Baker City Hall and the East Baton Rouge Parish Courthouse.

The Commissioner found that a reasonable effort was made to notice all the people required to receive notice, based on the fact that notice had been published and posted, and that friends and neighbors of those not noticed had been noticed.

According to our jurisprudence, publication in a newspaper is not sufficient to meet the statutes and procedural rules of the Commissioner's office. *Brown v. Sutton*, 356 So.2d 965 (La. 1978). In *Brown*, an overriding royalty interest owner was not given individual notice by the Commissioner of a hearing to establish a unitization proposed secondary recovery plan; notice of the hearing was published in the State-Times, through which the owner learned of the hearing. The Louisiana Supreme Court, in ruling on whether the owner had proper notice of the hearing, reasoned:

> Section 5 C [LSA—R.S. 30:5C] sets forth that the Commissioner can unitize, pool and consolidate 'only after notice.' Section 6 of Title 30 authorizes the Commissioner to prescribe rules of procedure. Rule 12 of the 'Rules of Procedure for Conducting Hearings Before the Commissioner of Conservation,' effective September 1, 1971, pertinently provides that 'If the application relates to a poolwide unit, then a copy of the application shall be furnished each Interested Owner and Represented Party.' *Brown*, 356 So.2d at 970.

Finding that the lack of formal notice was cured by actual

notice and that no prejudice resulted to the owner because he was able to attend the hearing, the court dismissed the owner's contentions as to notice.

In the case *sub judice,* the record establishes that the four unnoticed plaintiffs had no actual notice. In those cases where statutory requirements for notice were not met and notice by publication was held to be sufficient, those parties to whom notice should have been given received actual notice in some manner. *See Mayor & Council of Morgan City v. Ascension Parish Police Jury,* 468 So.2d 1291 (La.App. 1st Cir. 1985). *Summerville v. Louisiana Department of Public Safety,* 497 So.2d 344 (La.App. 2d Cir. 1986).

According to LSA-R.S. 30:6B, thirty days notice must be given for a hearing to revise units. The notice must be given in the manner prescribed by the Commissioner. The Rules of Procedure, which apply to hearings requiring thirty days notice (Rule 2), require that interested owners and represented parties be sent a pre-application notice, a hearing application notice, and the legal notice of the hearings; additionally, the legal notice is to be posted and published. Furthermore, attached to the hearing application notice [to the Commissioner] must be a "list of the names and addresses of all Interested Parties who are known to the applicant after reasonable search." (Rule 7). And, as earlier stated, the applicant in its pre-application notice is to submit a statement that a reasonable effort was made to determine to whom the notices as required by the rules must be sent.

In the case *sub judice,* Celeron, the applicant did not conduct a reasonable search or make a reasonable effort as to those parties in Units M-T. Examination of the record shows that Celeron put forth no effort to ascertain the par-

ties involved in Units M-T. The hearing requested by Celeron affected those holding mineral interests in twenty units; a reasonable effort and search were made to notify those holding mineral interests in twelve of the twenty units. However, where *no* effort was made to notify those in the remaining eight units, we can not say that as to all those holding mineral interests in Units A-T, a reasonable effort was made. Apparently in an attempt to justify their total lack of effort, defendant-appellees contend that a full title search would have been required to notify those parties holding mineral interests in Units M-T. We disagree. These eight units were added to Order 1047 in 1978 through a counterplan submitted by Martin Exploration Company. Yet, Celeron made no inquiry of Martin as to any of Martin's leasehold interests in Units M-T except where Martin's leases crossed over into Units A-L. Thus, we find that Celeron, the applicant, failed to comply with the Commissioner's procedural rules requiring notice. Moreover, the Commissioner was aware that no effort had been made to notify those holding mineral interests in Units M-T.

[4] Celeron contends that non-compliance with Rule 3 and Rule 7 can not be used to invalidate Order 1047-B due to Rule 17. Rule 17 reads as follows:

> Failure to comply with the provisions of or the spirit of these Rules of Procedure shall prevent an application from being advertised or heard, or shall prevent an opponent or supporting party from presenting evidence at the hearing, but an order issued by the Commissioner shall not be invalid by operation of this rule.

We disagree with defendant-appellee's contention. Rule 17 cannot be used to disregard the legislative mandate set forth in LSA-R.S. 30:6 requiring the Commissioner to

prescribe rules for the giving of thirty days notice prior to hearings. *See State v. Union Tank Car Co.*, 439 So.2d 377 (La. 1983). Furthermore, "administrative agencies are bound by their own rules which are promulgated to affect the rights and liabilities of members of the public." *Central Louisiana Electric Company, Inc. v. Louisiana Public Service Commission*, 377 So.2d 1188, 1195 (La. 1979). In this case, where the Commissioner's own procedural rules for giving notice of hearings were violated, where those procedural rules were enacted pursuant to legislative mandate, and where the violation of those rules caused a large class of people to be without notice of a hearing before the Commissioner, we are not bound by Rule 17 to uphold the order.

Defendant-appellees further contend in their brief:

> The longstanding practice of the Commissioner of Conservation has been to satisfy the thirty (30) day notice requirement of Section 6(B) by publishing the Legal Notice of the hearing in the official state journal more than thirty (30) days prior to the hearing date. The Rules of Procedure established by the Commissioner are not the manner which he prescribes for compliance with the thirty (30) day notice requirement of Section 6(B) of Title 30. The Rules of Procedure were designed to exceed this statutory notice requirement.

[5] As was pointed out earlier, the Louisiana Supreme Court in the *Brown* case found that publication was insufficient to meet the requirements of LSA-R.S. 30:6 where the Commissioner's rules required that a copy of the application be sent to the interested owner. Likewise, in this case we find that the statutory requirements of LSA-R.S.

30:6B are complied with only when the thirty day notice requirement is complied with in accordance with the Commissioner's prescribed rules, which go beyond a requirement of publication and posting.

[6] Because the unnoticed plaintiffs-appellants have shown that the Commissioner's order was made upon unlawful procedure, we must now determine from a review of the record whether substantial rights of the plaintiffs-appellants were prejudiced. LSA-R.S. 30:12 B(5). Defendant-appellees contend that plaintiffs-appellants' rights were not prejudiced because Units S and T, in which plaintiffs-appellants held mineral interests, were not productive during the existence of Order 1047, and they were not to be included in Order 1047-B. Plaintiffs-appellants contend that substantial rights were prejudiced because they had no notice and consequently no opportunity to participate in any fashion at the hearing. We agree with plaintiffs-appellants' contention. The purpose of the hearing was to dissolve the original units encompassing plaintiffs' property. By defendant-appellees' failure to attempt to inform the unnoticed plaintiffs of the July 23 hearing, the unnoticed plaintiffs were unaware of the proposed administrative action affecting their property, their right to attend the administrative hearing and present evidence, their right to be represented by legal counsel, and their right to confront and cross-examine adverse witnesses. *See Durousseau v. Louisiana State Racing Comm.*, 399 So.2d 1288 (La.App. 4th Cir. 1981). If the unnoticed plaintiffs had been noticed, they might have presented evidence which would have altered the Commissioner's findings, thus placing their land within geological units or maintaining their lands within the geographical units. Although defendant-appellees contend that the unnoticed plaintiffs' land was unproductive, at least one of the counterplans presented to the Commissioner at the hearing included the land of one

of the unnoticed plaintiffs, Dolese Concrete Company.

Defendant-appellees further contend that the unnoticed plaintiffs failed to show that substantial rights were prejudiced because there was no proof that they would have attended and participated in the hearing. Defendant-appellees cite *Placid v. North Central Texas Oil Co.*, 206 La. 693, 19 So.2d 616 (1944) for the proposition that plaintiffs-appellants must also show that they would have opposed the Commissioner's proposed order successfully. However, in *Placid*, the royalty owner attacking the unitization order of the Commissioner based on his failure to receive proper notice was unsuccessful because the unitization order was advantageous to the royalty owner. The court stated; "The presumption is that Parten [royalty owner] would not have opposed the application [for unitization]—not only because an opposition to it would have been against his interest but also because it would have been without avail." *Placid Oil Co.*, 19 So.2d at 622. This presumption is not available to us in this case. Celeron's proposal was disadvantageous to the unnoticed plaintiffs, giving rise to the possibility that they could have opposed Celeron's proposition successfully. For these reasons, we find that the decision of the Commissioner as to Order 1047-B must be reversed where substantial rights of the plaintiffs-appellants were prejudiced because the Order was issued in violation of statutory provisions and/or made upon unlawful procedure. LSA-R.S. 30:12B(5)(a) and (c).

Defendant-appellees repeatedly set forth in brief the difficulty and impossibility of notifying those interested parties in Units M-T. Yet, as we have tried to clarify in this opinion, the issue is not defendant-appellees failure to notify the unnoticed plaintiffs of the hearing; the issue is the defendant-appellees' *failure to make a reasonable effort* to notify those unnoticed plaintiffs. Making a reasonable

effort to notify those interested parties in Units A-L where Units A-T are involved does not constitute a reasonable effort to notify all those in Units A-T.

For these reasons, the decision of the trial court upholding the Order is reversed, and we declare Order 1047-B invalid. Costs to be assessed against defendant-appellees.

REVERSED.

APPENDIX E

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

NO. CA/86/1277-C

KAISER ALUMINUM EXPLORATION COMPANY, ET AL

-VERSUS-

PARISH OF E. BATON ROUGE
HONORABLE HERBERT W. THOMPSON, COMMISSIONER OF CONSERVATION AND ASSISTANT SECRETARY, OFFICE OF CONSERVATION OF THE STATE OF LA.

On Application For Rehearing.

Rehearing **GRANTED**

This rehearing application is granted for the limited purpose of amending the decretal paragraph to read as follows:

> "For these reasons, the decision of the trial court upholding the order is reversed, and we declare Order 1047-B invalid. Costs to be assessed against defendants-appellees."

REVERSED.

/s/ Grover L. Covington
GROVER L. COVINGTON

/s/ Felix H. Savoie, Jr.
FELIX H. SAVOIE, JR.

/s/ Daniel W. LeBlanc
DANIEL W. LEBLANC

Judges

Filed **MAR 30 1988**

/s/ Stanley P. Lemoine
STANLEY LEMOINE, Clerk

APPENDIX F

KAISER ALUMINUM EXPLORATION COMPANY, et al.

v.

The Honorable Herbert W. THOMPSON, Commissioner of Conservation and Assistant Secretary, Office of Conservation of the State of Louisiana.

No. 88-C-1036.

Supreme Court of Louisiana.

May 20, 1988.

In re Thompson, Herbert W., Comm. Cons.; Celeron Oil & Gas Co.—Other; First Energy Corp.—Other; Union Texas Petroleum Corp.—Other; TXO Production Corporation—Other; Borden Inc.—Other; Terra Resources Inc.—Other; applying for writ of certiorari and/or review; to the Court of Appeal, First Circuit, Nos. CA86 1277, CA86 1278; Parish of East Baton Rouge, 19th Judicial District Court, Div. "B", Nos. 294908, 294909.

Prior report: La.App., 523 So.2d 240.

Granted. Judgment of court of appeal is reversed. Judgment of district court is reinstated.

APPENDIX G

KAISER ALUMINUM EXPLORATION COMPANY, et al.

v.

The Honorable Herbert W. THOMPSON, Commissioner of Conservation and Assistant Secretary, Office of Conservation of the State of Louisiana.

No. 88-C-1036.

Supreme Court of Louisiana.

Sept. 9, 1988.

In re Kaiser Aluminum Exploration Co., et al, applying for rehearing of this Court's May 20, 1988 Order; to the Court of Appeal, First Circuit, Nos. CA86 1277, CA86 1278; Parish of East Baton Rouge, 19th Judicial District Court, Div. "B", Nos. 294908, 294909.

Prior report: La., 525 So.2d 1050.

Rehearing denied.

COLE, J., would grant the rehearing.

APPENDIX H

La. R.S. 30:6

§ 6. Hearings, notice; rules of procedure; emergencies; service of process; recordation and inspection; request for hearings

A. The commissioner shall prescribe the rules of order or procedure in hearings or other proceedings before him under this Chapter.

B. No rule, regulation, order, or change, renewal, or extension thereof, shall, in the absence of an emergency, be made by the commisioner under the provisions of this Chapter except after a public hearing upon at least ten days' notice given in the manner and form prescribed by him. This hearing shall be held at a time and place and in the manner prescribed by the commissioner. The commissioner, in his discretion, may designate a member of his staff to conduct public hearings on his behalf. Any person having an interest in the subject matter of the hearing shall be entitled to be heard. Whenever any application shall be made to the commissioner of conservation for creation, revision, or modification of any unit or units for production of oil or gas, or for adoption of any plan for spacing of wells or for cycling of gas, pressure maintenance or restoration, or other plan of secondary recovery, the applicant shall be required to file with the application two copies of a map of such unit or units or well spacing pattern or two explanations of such plan of cycling, pressure maintenance or restoration, or other secondary recovery program and at least thirty days' notice shall be given of the hearings to be held thereon, in the manner prescribed by the commissioner of conservation and a copy of such plat or explanation of program shall remain on file in the office of conservation in Baton Rouge and in the office of the district

manager of the conservation district in which the property is located, and be open for public inspection, at least thirty days prior to such hearing.

Amended by Acts 1982, No. 321, § 1.

C. If the commissioner finds an existing emergency which in his judgment requires the making, changing, renewal, or extension of a rule, regulation, or order without first having a hearing, the emergency rule, regulation, or order shall have the same validity as if a hearing had been held after due notice. The emergency rule, regulation, or order shall remain in force no longer than fifteen days from its effective date. In any event, it shall expire when the rule, regulation, or order made after notice and hearing with respect to the same subject matter becomes effective.

D. Should the commissioner elect to give notice by personal service, it may be made by any officer authorized to serve process or any agent of the commissioner in the same manner as is provided by law for the service of citation in civil actions in the district courts. Proof of the service by an agent shall be by the affidavit of the person making it.

E. All rules, regulations, and orders made by the commissioner shall be in writing and shall be entered in full by him in a book kept for that purpose. This book shall be a public record and shall be open for inspection at all times during reasonable office hours. A copy of a rule, regulation, or order, certified by the commissioner, shall be received in evidence in all courts of this state with the same effect as the original.

F. Any interested person has the right to have the commissioner call a hearing for the purpose of taking action in respect to a matter within the jurisdiction of the commis-

sioner by making a request therefor in writing. Upon receiving the request the commissioner shall promptly call a hearing. After the hearing, and with all convenient speed and in any event within thirty days after the conclusion of the hearing the commissioner shall take whatever action he deems appropriate with regard to the subject matter. In the event of failure or refusal of the commissioner to issue an order within the period of thirty days, he may be compelled to do so by mandamus at the suit of any interested person.

Amended by Acts 1954, No. 174, § 1; Acts 1954, No. 489, § 1.

RULES OF PROCEDURE FOR CONDUCTING HEARINGS BEFORE THE COMMISSIONER OF CONSERVATION OF THE STATE OF LOUISIANA

Effective October 11, 1983

RULE 3—PRE-APPLICATION NOTICE

Except as provided by Rule 8, any person intending to apply for a hearing, prior to filing application, shall send a notice outlining the proposal to the Commissioner (in duplicate) with a copy to the District Manager and to each Interested Owner and Represented Party. Interested Owners and Represented Parties need not be furnished the list described in sub-paragraph (a), but the applicant upon request shall furnish a copy of said list to the requesting party.

Each pre-application notice shall include or be accompanied by the following:

a. A list of the names and addresses of all Interested Owners and Represented Parties to whom it is being sent.

b. A statement that a reasonable effort has been made

to determine to whom the notices as required by this rule must be sent.

c. An explanation of the nature of the proposal and a copy of a unit plat for each sand, if units are involved, prepared in accordance with all applicable memoranda and the procedure for assigning nomenclature of Section II of Statewide Order No. 29-B, with any geological bases for any unit boundary labeled thereon. A reasonable effort shall be made to prepare the plat in sufficient detail to enable affected parties to determine the location of their lands.

d. A day, time and place for a conference which need be held only if notice of a desire to confer with respect to the application is given as hereinafter provided. Any such conference shall be held within the State of Louisiana (unless mutually agreed otherwise among all Interested Owners and Represented Parties) in a city reasonably convienient to the persons involved and shall be scheduled for not less than twenty (20) calendar days following the date of the pre-application notice.

e. A definition of the sand proposed for unitization with such sand defined in each reservoir thereof by reference to well log measurements.

If an applicant has proof acceptable to the Commissioner that there is no necessity to confer about the proposal because there is no indication of opposition from any person to whom the pre-application notice must be sent, he may immediately proceed to file his application and need not schedule a conference nor comply with Rules 7a and 7d hereof.

RULE 7—HEARING APPLICATION

The hearing application may be filed immediately after the pre-application conference or as otherwise provided in Rules 3 and 5 and shall be filed with the Commissioner (in

duplicate) with a copy to the District Manager and to each Interested Owner and Represented Party. Interested Owners and Represented Parties need not be furnished the lists described in sub-paragraphs (a) and (b), but the applicant upon request shall furnish copies of said lists to the requesting party. In addition to outlining the purpose thereof, the application shall include or be accompanied by the following:

a. A list of the names and addresses of Interested Owners and Represented Parties notified, as required by Rule 3(a).

b. A list of the names and addresses of all Interested Parties who are known to the applicant after reasonable search. In addition to the publication of the Legal Notice by the Commissioner in the official state journal, the applicant shall provide for posting of a copy of the Legal Notice of the hearing and unit plat or plats in a prominent place in the area affected and publication of a copy of the Legal Notice in a newspaper published in the vicinity or general area of the affected field at least fifteen (15) days before the hearing. The applicant shall mail copies of the Legal Notice to all Interested Owners, Represented Parties and Interested Parties and a copy of the unit plat or plats shall be included with the Legal Notice, if said parties have not already been furnished same. Evidence to establish posting, publishing and mailing shall be submitted at the hearing.

c. A statement that a reasonable effort has been made to obtain a complete list of Interested Parties, Interested Owners and Represented Parties.

d. A statement that a conference has or has not been held, including a brief report on the conference, if held, and a list of the parties in attendance.

e. A unit plat, if units are involved, prepared in accordance with all applicable memoranda and the procedure for assigning nomenclature of Section II of Statewide Order

No. 29-B, with any geological bases for any unit boundary labeled thereon and the other items required by statute or by the Commissioner.

f. A definition of the sand proposed for unitization with such sand defined in each reservoir thereof by reference to well log measurements.

A request for rules and regulations for more than one sand shall be considered a separate application for each sand and the Commissioner shall be furnished an extra copy of the application for each additional sand affected thereby. A fee of $300.00 for each sand shall be filed with the application as required by Section 21 of Title 30 of Louisiana Revised Statutes of 1950.

If, as result of any conference, the applicant's proposal as set forth in a pre-application notice is revised, the revised proposal shall be explained in the application, and if units are involved and are revised, the revised unit plat shall be filed with the application.

If the application does not change or alter the units as proposed in the pre-application notice, additional plats need not be furnished to Interested Owners and Represented Parties.

If differences are not resolved or if any Interested Owner or Represented Party desires to oppose or support a proposal by the introduction of evidence at the hearing, then not less than fifteen (15) calendar days before the hearing, he must file with the Commissioner and furnish to the District Manager, the applicant and all persons who attended the pre-application conference his counterplan or supporting plan, including a plat of his proposed units, if units are involved, prepared in accordance with all applicable memoranda and the procedure for assigning nomenclature of Section II of Statewide Order No. 29-B. with any geological bases for any unit boundary labeled thereon, accompanied by a letter explaining any points of

difference with the applicant's plan.

RULE 17—PENALTY FOR NON-COMPLIANCE

Failure to comply with the provisions of or the spirit of these Rules of Procedure shall prevent an application from being advertised or heard, or shall prevent an opponent or supporting party from presenting evidence at the hearing, but an order issued by the Commissioner shall not be invalid by operation of this rule.